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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM C. WELDEN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

OPINION BELOW

The Memorandum and Order of the district court (Appendix A, *infra*, pp. 15–18) is not yet reported.

JURISDICTION

The indictment was filed under Section 1 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. 1) and under the Conspiracy Act (18 U.S.C. 371). The judgment of acquittal of appellee Welden (Appendix B, *infra*, p. 19) was entered on March 27, 1963, upon the district court's grant of appellee's motion to dismiss the indictment on the ground that appellee had obtained immunity from prosecution by virtue of testimony he gave before a Congressional committee. Notice of appeal was filed on April 26, 1963.

The jurisdiction of this Court to review by direct appeal the judgment of the district court is conferred by the Criminal Appeals Act (18 U.S.C. 3731); since that judgment is one "sustaining a motion in bar, when the defendant has not been put in jeopardy." *United States* v. *Monia*, 317 U.S. 424; *United States* v. *Hoffman*, 335 U.S. 77.

STATUTE INVOLVED

The Act of February 25, 1903, 32 Stat. 854, 904, 15 U.S.C. 32, provides in part:

> * * * no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts [the Interstate Commerce Act, the Sherman Act, and the antitrust provisions of the Wilson Tariff Act]: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

QUESTION PRESENTED

Whether a person who testifies before a Congressional subcommittee is testifying in a "proceeding, suit, or prosecution under" the antitrust laws and thereby obtains immunity under 15 U.S.C. 32 from prosecution with respect to any matter concerning which he testifies.

STATEMENT

On September 6, 1962, an indictment was returned against three corporations—H. P. Hood & Sons, Inc.,

United Farmers of New England, Inc., and National Dairy Products Corporation—and five individuals, including appellee who is an employee of H. P. Hood & Sons, Inc.[1] Count One charged the defendants with violating Section 1 of the Sherman Act by conspiring, among other things: to fix prices in the sale of milk in the Greater Boston Area; to allocate among themselves the business of selling milk to designated federal, State, and municipal institutions in Maine, New Hampshire, and Massachusetts; and to engage in collusive bidding for contract awards from these institutions. Count Two charged all three corporations and three of the individuals, including appellee, with a conspiracy to defraud and injure the United States in violation of 18 U.S.C. 371.

Appellee moved to dismiss the indictment on a number of grounds.[2] One ground was that prosecution was prohibited under the provisions of 15 U.S.C. 32 because he had previously given testimony before a House subcommittee concerning transactions, matters, and things covered by the indictment. It is unnecessary to set out the particulars of appellee's testimony before the House subcommittee, for no contention is made by the government here, and none was made below, that the testimony given did not concern

[1] The indictment of September 6, 1962, superseded one returned on April 24, 1962, against the same defendants. The April 24th indictment was dismissed by the government, with the consent of the court, on December 5, 1962.

[2] Appellee's motion was addressed to the April 24th indictment, but by stipulation filed on September 25, 1962, the motion was made applicable to the September 6th indictment.

in a substantial way the matters charged in the indictment.[3]

The district judge on March 27, 1963, filed a Memorandum and Order, upholding appellee's position and rejecting the government's contention that testimony before a Congressional committee is not given in "a proceeding * * * under [the antitrust laws]" within the meaning of 15 U.S.C. 32. Accordingly, the judge concluded that 15 U.S.C. 32 bars appellee's prosecution and dismissed the indictment as to him.[4]

THE QUESTION IS SUBSTANTIAL

Appellee testified in response to a subpoena before a Congressional committee investigating certain economic practices in the dairy industry. He did not claim the privilege against self-incrimination or in any way indicate an unwillingness to testify. It is and has been the government's contention that ap-

[3] Appellee's testimony is set forth in Hearings before the Special Subcommittee of the Select Committee on Small Business, House of Representatives, 86th Cong., 2d Sess., Part IV, pp. 665–700. These hearings, which concerned practices in the distribution of dairy products, are included in the record certified to this Court. The Select Committee had been authorized by the House to study and investigate the problems of all types of small business (H. Res. 51, 86th Cong., 1st Sess., 105 Cong. Rec. 1785) and its chairman appointed the Special Subcommittee to study the problems of small business in the dairy industry (H. Rep. 714, 86th Cong., 1st Sess.).

[4] The district court did not pass on appellee's alternative contention that he had obtained immunity as a result of testimony given in a Federal Trade Commission proceeding, although it was specifically requested to do so by the government (Transcript of April 16, 1963, pp. 3–5).

pellee was free to rely upon his Fifth Amendment privilege and could refuse to give self-incriminatory testimony before the Congressional committee because no statute granted him immunity from prosecutions involving matters about which he might testify before such a committee. The district court rejected this contention. It held that appellee received immunity under 15 U.S.C. 32, which grants immunity to any witness testifying under subpoena in any proceeding under the Sherman Act or the antitrust provisions of the Wilson Tariff Act, without any requirement of asserting his Fifth Amendment privilege. This holding is contrary to the explicit wording of the statute and is inconsistent with the statute's history. It will seriously impair the freedom of Congress to investigate various economic wrongs; it will unduly limit the privilege of a witness to invoke the Fifth Amendment before a Congressional committee; and it will needlessly prevent the proper performance of the government's duty to prosecute violations of a number of federal statutes.

1. Section 32 of Title 15 provides:

> No person shall be prosecuted * * * for * * * any * * * matter * * * concerning which he may testify * * * in any proceeding, suit, or prosecution under sections 1–7 of this title * * * and sections 8–11 of this title. * * *

On its face, this language does not cover testimony given before Congressional committees. The sections in Title 15 to which explicit reference is made constitute the Sherman Act and the antitrust provisions of the Wilson Tariff Act. These statutes authorize a

variety of proceedings to enforce the several remedies for which they provide, including (1) criminal prosecutions for violations;[5] (2) suits in equity to enjoin violations;[6] and (3) forfeiture proceedings.[7] The "proceeding, suit, or prosecution *under* sections 1–7 of this title * * * and sections 8–11 of this title" [italics added] to which section 32 refers are those proceedings authorized by these Acts. Hearings of Congressional committees are conducted under resolutions of a House of Congress; they are not proceedings "under" the antitrust laws within the meaning of section 32. Indeed we know of no prior case, during the sixty years since the passage of what is now 15 U.S.C. 32, which has held this statute applicable to testimony given before a Congressional committee.[8]

2. Any possible doubt as to the meaning of this provision is dispelled by its legislative history.

A. The immunity provisions contained in 15 U.S.C. 32 were enacted as part of the general appropriations

[5] Sherman Act §§ 1 and 2; Wilson Tariff Act, § 73.

[6] Sherman Act, § 4; Wilson Tariff Act, § 74.

[7] Sherman Act, § 6; Wilson Tariff Act, § 76.

[8] In the court below appellee relied upon an oral opinion of a district court in *United States* v. *Armour & Co.*, 142 Fed. 808 (N.D Ill.), a case also cited by the court below. This opinion was almost entirely devoted to consideration of the scope of a wholly separate immunity provision in a 1903 statute creating a Commissioner of Corporations. It neither involves nor considers the applicabilty of the predecessor provisions of 15 U.S.C. 32 to investigations before a Congressional committee, although, in dictum (at 826), the district court did state—we believe erroneously—that these antitrust immunity provisions would apply to a proceeding before the Commissioner of Corporations.

Act of February 25, 1903, which provided in pertinent part as follows:

> * * * That for the enforcement of the provisions of the [Interstate Commerce] Act * * *, * * * the [Sherman] Act * * * and * * * [the antitrust provisions of the Wilson Tariff] Act, * * * the sum of five hundred thousand dollars * * * is hereby appropriated * * * to be expended under the direction of the Attorney General * * * to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States: *Provided,* That no person shall be prosecuted * * * for * * * any * * * matter * * * concerning which he may testify * * * in any proceeding, suit, or prosecution under said Acts * * *.

In that Act Congress after referring to the Sherman, Interstate Commerce, and Wilson Tariff Acts, appropriated $500,000 "to be expended under the direction of the Attorney General * * * to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States." In the very next sentence Congress then provided immunity for any matter concerning which a person might testify in the type of proceedings for which it had just appropriated $500,000—*i.e.*, "in any proceeding, suit, or prosecution under said Acts * * *." Unless the same phrase was intended to have different meanings in two successive sentences of the same Act, the immunity provision, like the appropriations provision, applied only to proceedings, suits, or prosecutions brought "under the direction of the Attorney General * * * in the courts of the United States." Its obvious purpose was to

give the Attorney General, in the conduct of judicial proceedings under the statutes there specified, the authority to compel incriminating testimony *in such proceedings* whenever the need for such testimony outweighed the public interest in prosecuting the particular witness.

While there have been various minor changes in phraseology in the codification of the immunity provision, there is nothing which indicates, or even suggests, that Congress thereby intended to change the substantive scope of the immunity which it conferred in 1903, namely, that immunity was conferred only for testimony given in judicial proceedings instituted by the Attorney General.

B. Congress has been exceedingly sparing in granting to its committees the power to compel testimony by giving a witness an immunity from prosecution. Since 1862 there has been no provision broadly empowering committees to grant an immunity, commensurate with the Fifth Amendment privilege, for testimony given before them. Compare 11 Stat. 155 with 12 Stat. 333. Setting to one side the issue of this case, we know of only one occasion during the last 100 years on which Congress has granted an immunity for testimony before its committees on any particular subject: the Act of August 20, 1954, which permits committees to grant immunity with respect to matters involving national defense and security but only under carefully prescribed conditions.[9] In the

[9] Statutory prerequisites to this grant of immunity are that: (a) the witness has claimed his privilege against self-incrimination, (b) a two-thirds vote of the full committee has affirmatively authorized the grant of immunity, (c) an order of a

light of this history it is extremely unlikely that, had Congress intended to grant an immunity from prosecution with respect to any matters about which a witness might testify before a committee investigating violations of the antitrust laws, it would have done so without any discussion on the floor or in the committee of either house. Yet the legislative history of the immunity act of 1903 fails to reveal even the slightest indication that Congress intended to grant an immunity for testimony before a legislative committee when it spoke of testimony "in any proceeding, suit, or prosecution under [the antitrust statutes] * * *."

C. The history of the antitrust immunity act of 1903 is intimately involved with that of the Compulsory Testimony Act of 1893 (27 Stat. 443, 49 U.S.C. 46), which created a similar immunity for testimony in judicial or administrative proceedings arising out of violations of the Interstate Commerce Act. When this Court's decision in *Counselman* v. *Hitchcock*, 142 U.S. 547, established that an immunity provision limited to prohibiting the use of evidence furnished by the witness was not commensurate with the scope of a witness' privilege under the Fifth Amendment, it became apparent that the immunity provision of the original Interstate Commerce Act (24 Stat. 383) was ineffective. To remedy this, both houses of Congress considered bills initially limited to testimony "in any criminal case or proceeding"

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federal district court has been entered in the record requiring the witness to give evidence, and (d) the Attorney General has been notified of the proposed grant of immunity and has been given an opportunity to be heard in the district court with respect to each application for an order to compel testimony.

(23 Cong., Rec. 6332; H.Rep. 2173, 52d Cong., 2d Sess.) but later broadened to include not only testimony before the Interstate Commerce Commission but testimony "in any cause or proceeding, criminal or otherwise" (24 Cong. Rec. 709). The statute was passed in the broader form, but its scope was still plainly limited to administrative and judicial proceedings. In January 1902, the Compulsory Testimony Act was held inapplicable to a proceeding under the Sherman Act and was held to be "confined by its terms to proceedings" under the Interstate Commerce Act. *Foot* v. *Buchanan*, 113 Fed. 156, 160 (C.C.N.D. Miss.). Thereupon, and with an evident intent to model the immunity upon that in the Compulsory Testimony Act of 1893, Congress passed the bill which is now found in 15 U.S.C. 32. The history of this statute is barren of any indication that the scope of the immunity there provided was to be any greater than that provided by the Compulsory Testimony Act of 1893, and was to extend to testimony before Congressional committees. The absence of any such indication is particularly significant in light of the inhibiting effect which the broader immunity granted by the district court in this case would have upon the exercise of Congressional investigatory power. See *infra*, pp. 11–12. A statute should not be construed to produce that result unless the intent of Congress to do so clearly appears—and no such intent is manifested, or even suggested, by the language or history of the antitrust immunity provision.

3. The question presented by this appeal is of substantial importance to Congress, to witnesses before

Congressional committees, and to the government officials charged with enforcing the antitrust laws. The hearings of a great number and variety of Congressional committees and subcommittees [10] frequently involve matters of monopoly power and trade restraints. Under the district court's decision, such hearings would fall within the immunity provisions of 15 U.S.C. 32.

Since a witness in a "proceeding" covered by 15 U.S.C. 32 obtains immunity with respect to any matter covered by his testimony, even though he does not claim his privilege against self-incrimination (*United States* v. *Monia,* 317 U.S. 424), any committee investigating matters bearing upon the antitrust laws can, under the decision below, ask questions of witnesses only at the expense of conferring upon these witnesses a broad immunity from criminal prosecution. The certain consequence would be a substantial inhibition upon the exercise by Congress of its normal investigatory functions.

The effects of the decision below upon the enforcement of the antitrust laws and the rights of witnesses

[10] For example, (1) the following standing committees of the Senate: Agriculture and Forestry, Banking and Currency, Commerce, Finance, Interior and Insular Affairs, Judiciary; (2) the following standing committees of the House: Agriculture, Banking and Currency, Interior and Insular Affairs, Interstate and Foreign Commerce, Judiciary, and Merchant Marine and Fisheries; (3) both the House and Senate Select Committee to Conduct a Study and Investigation of the Problems of Small Business; and (4) the following Congressional joint committees: Joint Committee on Atomic Energy, Joint Committee on Defense Production, and Joint Economic Committee.

are equally significant. The rationale of the decision below would grant a wholly unanticipated immunity from prosecution to every witness who has heretofore testified before a Congressional committee investigating antitrust matters. It will grant a similar immunity to every witness who may, in the future, be called by a committee of Congress investigating these matters, whether or not the witness alerts the committee to the fact that its questions bear on matters which may tend to incriminate him.

Finally, the effects of the decision below are not limited to antitrust matters. Other federal immunity statutes fall within the scope of its reasoning. Obvious examples are the immunity provisions of the Interstate Commerce Act (49 U.S.C. 47) which are also derived from the general appropriation Act of February 25, 1903, and later enactments which incorporate these provisions by reference. § 205(d), Motor Carrier Act, 49 U.S.C. 305(d); § 316(a), Water Carrier Act, 49 U.S.C. 916; § 417(a), Freight Forwarders Act, 49 U.S.C. 1017(a); see also §§ 6(b), 8(e)–(g); Commodity Exchange Act, 7 U.S.C. 15.

CONCLUSION

This appeal presents a substantial question of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

RALPH S. SPRITZER,
*Acting Solicitor General.**
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ROBERT B. HUMMEL,
IRWIN A. SEIBEL,
Attorneys.

JUNE 1963.

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* In place of the Solicitor General, who has disqualified himself for personal reasons.

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Criminal No. 62-286-C

UNITED STATES OF AMERICA

v.

H. P. HOOD & SONS, INC., UNITED FARMERS OF NEW ENGLAND, INC., NATIONAL DAIRY PRODUCTS CORPORATION, HARVEY P. HOOD, WILLIAM C. WELDEN, STANLEY W. BEAL, ALBERT C. FISHER, LEO G. MAHER

MEMORANDUM AND ORDER

MARCH 27, 1963.

CAFFREY, D.J.

The five individual and three corporate defendants filed a series of substantially identical motions. In addition a claim of immunity to prosecution was asserted by the defendant William C. Welden. The motions will be dealt with *seriatim*.

I. *The Motions for Bills of Particulars.* The indictment filed herein, which was drawn in clear and simple language, sufficiently apprises each defendant of the nature of the offenses charged to enable him or it to prepare a defense and to protect each defendant from any risk of double jeopardy. *Russell* v. *United States*, 369 U.S. 749, 763-4 (1962). All motions for bills of particulars are denied.

II. *The Motions To Strike Certain Allegations of the Indictment.* All motions to strike are denied.

United States v. *Russo*, 155 F. Supp. 251, 254 (D. Mass. 1957).

III. *The Motions To Dismiss.* The motions to dismiss filed on behalf of the corporate defendants and the defendants Hood, Beal, Fisher and Maher are denied. The motion to dismiss the indictment as to defendant Welden is allowed.

I find that Mr. Welden was subpoenaed to appear before a Special Subcommittee of the Select Committee on Small Business of the House of Representatives, 86th Congress, 2d Session, pursuant to H. Res. 51, and to bring with him certain documents, records and papers of H. P. Hood Company for the period 1937 to the date of the subpoena and I find that the subpoena required Mr. Welden "then and there to testify touching matters of inquiry committed to said Committee." I further find that pursuant to the subpoena Welden produced documents of Hood and was then interrogated at considerable length as to the nature of his activities on behalf of Hood and as to the price policy of the company. I find that Welden testified on February 18 and 19, 1960, about economic practices pursued by the Hood Company, about the competitive situation in the Greater Boston milk market, about price changes and policies of Hood, and about meetings between himself and representatives of competitors of Hood, to such an extent as to bring him within the immunity provisions of 15 U.S.C.A. 32. I find absolutely no evidence in the record presently before this Court of any waiver of his immunities by Mr. Welden. It must be remembered that waiver is to be found only upon clear proof thereof. See *Himmalfarb* v. *United States*, 175 F. 2d 924, 931 (9 Cir. 1949). It is immaterial that Welden did not affirmatively claim immunity. *United States* v. *Monia*, 317 U.S. 424, 430 (1943).

I rule that Mr. Welden's testimony was pertinent "to the very heart and substance of the matters charged in the indictment." *United States* v. *Armour*, 64 F. Supp. 855, 857 (E.D. Pa. 1946). I reject the Government's contention that 18 U.S.C.A. 3486 is the exclusive source of immunity to persons testifying before a Congressional committee. A reading of Section 3486 makes it clear that Congress in enacting that section was concerned only with the immunity of witnesses testifying before Congressional committees in the area of national security and defense. This section does not purport to regulate the immunity question in any Congressional investigation outside the area of national defense and security.

The word "proceeding" in 15 U.S.C.A. 32 should not be given the narrow technical scope argued for by the Government where to do so would fly in the face of traditional American notions of fair play (cf. *McDonald* v. *Mabee*, 243 U.S. 90 (1917)) and subject a defendant to stand trial for conduct about which he has been compelled to testify by the subpoena power of a Congressional Subcommittee. *United States* v. *Armour*, 142 Fed. 808 (N.D. Ill. 1906); cf. *Bowers* v. *New York & Albany Lighterage Co.*, 273 U.S. 346, 352 (1927).

Finally, the Government's contention that the hearings were not conducted under the anti-trust laws as required by 15 U.S.C.A. 32 before immunity will attach is disposed of by the words of Chairman Tom Steed in opening the hearings: "The purpose of these hearings is to receive testimony about alleged attempts of large distributors of dairy products in the New England area to destroy small competitors and to gain control over prices and markets." Hearings before the Special Subcommittee of the Select Committee on Small Business of the House of Represent-

atives, 86th Cong., 2d Sess., Part IV, at 363 (1960). The hearings were clearly within the ambit of the immunity statute.

The indictment is dismissed as to defendant William C. Welden.

(S) ANDREW CAFFREY,
U.S.D.J.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Criminal No. 62-286-C

UNITED STATES OF AMERICA

v.

H. P. HOOD & SONS, INC., UNITED FARMERS OF NEW ENGLAND, INC., NATIONAL DAIRY PRODUCTS CORPORATION, HARVEY P. HOOD, WILLIAM C. WELDEN, STANLEY W. BEAL, ALBERT C. FISHER, LEO G. MAHER

JUDGMENT

MARCH 27, 1963.

In accordance with Memorandum and Order of the Court handed down this date, it is

ORDERED:

Judgment of acquittal for defendant William C. Welden.

By the Court,

(S) William J. Lyons,
WILLIAM J. LYONS,
Deputy Clerk.

(S) ANDREW CAFFREY,
U.S.D.J.

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